

## **BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

### **OPINIONS OF THE COURTS BELOW**

The opinion of the Circuit Court of Appeals is, as yet, unreported. It will be found on pages 180 to 185 of the Record. The unreported opinion of the District Court for the Eastern District of Michigan, Southern Division, which was affirmed by the Circuit Court of Appeals, is set forth on pages 166-169 of the Record.

### **JURISDICTION**

1. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, Title 28, U.S.C.A. Section 347.
2. The judgment of the Circuit Court of Appeals was entered on November 13, 1940 (R. 179). No petition for rehearing was filed.
3. The nature of the case, the rulings of the District Court and the Circuit Court of Appeals for the Sixth Circuit, and the reasons why a writ of certiorari should be granted are set forth in the foregoing petition.

4. The grounds upon which the writ is asked are two of the reasons set forth in Rule 38 5(b) of the Rules of your Honorable Court, as follows:

(a) The decision of the Circuit Court of Appeals decides important questions of Federal Law which have not been but should be settled by this Court, and

(b) The Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

### **STATEMENT OF THE CASE AND QUESTION INVOLVED**

The petition for the writ of certiorari contains a statement of the case and of the question involved, as well as a statement of the facts material to their consideration. In the interest of brevity the question involved and material facts are not repeated here.

### **STATUTE AND REGULATION INVOLVED**

The statute and the regulation involved are Section 23 (k) of the Revenue Act of 1928, 45 Stat. 791, and Treasury Regulation 74, Article 206.

Revenue Act of 1928, c. 852, 45 Stat. 791:

Sec. 23 "In computing net income there shall be allowed as deductions: . . .

“(k) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. . . .”

**Treasury Regulation 74, Article 206:**

“With respect to physical property the whole or any portion of which is clearly shown by the taxpayer as being affected by economic conditions that will result in its being abandoned at a future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost (or other basis) at the end of its economic term of usefulness, a reasonable deduction for obsolescence, in addition to depreciation, may be allowed in accordance with the facts obtaining with respect to each item of property concerning which a claim for obsolescence is made. No deduction for obsolescence will be permitted merely because, in the opinion of a taxpayer, the property may become obsolete at some later date. This allowance will be confined to such portion of the property on which obsolescence is definitely shown to be sustained and can not be held applicable to an entire property unless all portions thereof are affected by the conditions to which obsolescence is found to be due.”

**SPECIFICATION OF ERRORS TO BE URGED**

1. The Circuit Court of Appeals erred in affirming the judgment of the District Court.
2. The Circuit Court of Appeals erred in holding that an allowance for obsolescence can not be had without

abandonment or evidence of intention to abandon the property in question.

3. The Circuit Court of Appeals erred in holding that Treasury Regulation 74, Article 206, requires abandonment or a showing of an intention to abandon an asset before any allowance can be made for the obsolescence of that asset.

4. The Circuit Court of Appeals erred in sustaining the validity of Treasury Regulation 74, Article 206, in so far as that Regulation may require abandonment or evidence of an intention to abandon an asset as a condition precedent to a reasonable allowance for its obsolescence under Section 23 (k) of the Revenue Act of 1928.

5. The Circuit Court of Appeals erred in not entering judgment for petitioner in the amount claimed.

6. The Circuit Court of Appeals erred in defining "obsolescence," as that term is used in Section 23 (k) of the Revenue Act of 1928, and applying the same to the facts in this case in disregard of and contrary to the definitions of that term as used in such act and as laid down by the decisions of this Court.

7. The Circuit Court of Appeals erred in not holding that petitioner was entitled to an allowance for obsolescence to the extent, at least, of the ferry boats and special ferry equipment which in fact became "disused" because of the construction and operation of the bridge and tunnel.

## ARGUMENT

### **1. The Decision of the Circuit Court of Appeals Decides Important Questions of Federal Law Which Have Not Been But Should Be Settled By This Court**

This Court has never directly passed upon the question as to whether the abandonment of property at a future date prior to the end of its normal useful life is, in and of itself, a condition precedent to a reasonable allowance for the obsolescence of such property.

There is no dispute in this case but that petitioner would have been entitled to the obsolescence deductions claimed by it had petitioner abandoned or sold the property in question at the end of the year 1930.

If Treasury Regulation 74, Article 206, requires abandonment as such a condition precedent, the validity of that Regulation has not been passed on by this Court. If that Regulation does not make such a requirement it has never been so construed by this Court.

### **2. The Circuit Court of Appeals Has Decided a Federal Question in a Way Probably in Conflict With Applicable Decisions of This Court**

In *Burnet v. Niagara Brewing Co.*, 282 U. S. 648, the taxpayer made deductions for obsolescence in its tax return for the years 1918 and 1919. They were disallowed by the Government because taxpayer continued to use the property to make and sell near beer and other non-intoxicating beverages. In the Circuit Court of Appeals (38 F. (2d) 217) the Commissioner made the contention that Article 143 of Regulation 45 of the Treasury De-

partment was applicable and that that article prohibited the deduction for the reason that abandonment had not already taken place. That court held such Regulation invalid for the reason that it imposed an additional condition on the taxpayer not prescribed by the statute. Apparently this contention was not repeated by the Commissioner in this Court, but he claimed that it must appear that the taxpayer foresaw with reasonable certainty that his property would not be useful in his business or any other business at some definite time in the future and that the property would have to be abandoned. The property was not in fact abandoned until 1928. This Court allowed the deduction for obsolescence. It said, page 655:

“There is no hard and fast rule, as suggested by the Government, that a taxpayer must show that his property will be scrapped or cease to be used or useful for any purpose, before any allowance may be made for obsolescence.”

And, on page 656:

“Notwithstanding diligent efforts, the property could not be put to any profitable use or sold for more than a fraction of its value in 1917. . . .

“. . . The company was unable to find any profitable use to which the property could be put.”

In *Gambrinus Brewery Co. v. Anderson*, 282 U. S. 638, decided on the same day as the *Niagara Brewing Co.* case, *supra*, this Court allowed the deduction for obsolescence even though the buildings were subsequently used after prohibition for the manufacture of non-intoxicating beverages, saying, page 645:

“Undoubtedly it was obvious from the beginning of that period (i. e., the prohibition period) that buildings not commercially adaptable to any use

other than brewing intoxicating liquor would suffer obsolescence because of the destruction of that business."

There is, in the above cases, no trace of the theory that there must be abandonment of the property at the end of the period of obsolescence. In both these cases *the property was used after prohibition to perform the identical processes for which it had been used theretofore*. The only change was that an additional process was added for de-alcoholizing the beer.

This Court, in the *Niagara Brewing Co.* case, *supra*, page 654, defines obsolescence as follows:

"The word is much used and its meaning depends upon and varies with the connections in which it is employed. It has been said to be 'the condition or process by which units gradually cease to be useful or profitable as a part of the property, on account of changed conditions.' Obsolescence is not necessarily confined to particular elements or parts of a plant; the whole may become obsolete. Obsolescence may arise as the result of laws regulating or forbidding the particular use of the property as well as from changes in the art, the shifting of business centers, loss of trade, inadequacy or other causes."

These two opinions are, we think, applicable and conclusive in the present case. If obsolescence was allowed in them (and it was) it should be allowed here. Our case is even stronger than the brewery cases because, there, it was merely conjecture whether the property could be used profitably after prohibition, and no such determination was made by the brewery companies at the time the prohibition law went into effect. In our case it was clear that if the depreciated cost (less salvage

value) of these assets was not recovered by the end of 1930 it never could be recovered because profitable life in any use was then ended.

In *United States Cartridge Co. v. U. S.*, 284 U. S. 511, the Commissioner disallowed a deduction for obsolescence, claimed on certain buildings in taxpayer's income tax return for 1918, for the reason that the company had not abandoned the use of the buildings or permanently devoted them to a use radically different from their original one (p. 515). After again defining obsolescence, page 516, this Court held that the value of the assets remaining after 1918 was properly to be regarded in the nature of salvage and that the taxpayer was entitled to the obsolescence deduction, indicating clearly that abandonment was not required as a condition to such allowance.

### CONCLUSION

For the foregoing reasons it is respectfully submitted that the Petition for a Writ of Certiorari should be granted, as prayed for.

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